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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 275.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

vs.

VICKSBURG WATER WORKS COMPANY.

BRIEF FOR APPELLEE.

J. HIRSH,
MURRAY F. SMITH,
Solicitors for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26218

(20,226.)

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THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

v.

VICKSBURG WATER WORKS COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

BRIEF FOR APPELLEE.

Statement of the Case.

The history of this Water Works Company, the appellee, is partly written in the law books. For nearly seven long years it has been seeking to maintain the integrity *of a contract,* solemnly entered into with the Mayor and Aldermen of the City of Vicksburg on the 18th day of November, 1886, which it acquired in good faith, and for a valuable consideration, and which was recognized as a binding obligation by the said Mayor and Aldermen of the City of Vicksburg, the appellant, for nearly fourteen years; and only when nearly half of the period of its duration had expired, and

after many thousands of dollars had been expended in the construction and maintenance of an expensive water works' system, and the recent erection of a successful filtering plant, did the appellant begin to search for causes of complaint.

But, commencing with a suit instituted by the City of Vicksburg against appellee in the chancery court of Warren county, State of Mississippi (the bill of complaint in that case being filed on December 7, 1900, and appears on pages 48 to 58, both inclusive, of the record, up to the present time), the appellee has been compelled to battle for its rights and constantly appeal to the courts for protection.

This appellee has had two adjudications in its favor in this court, two in the court below, and one in the Supreme Court of Mississippi, and in all said suits *its contract* with the Mayor and Aldermen of the City of Vicksburg was involved; and yet, after all this expenditure of time and the cost and embarrassment incident to all litigation, it is now gravely stated in the first three lines of the brief of the appellant, "The case is now for the first time presented on its merits," and by one apparent sweep of the pen all the previous battles fought and all the preceding tedious litigation are characterized as involving *only* "preliminary and incidental questions."

If it takes seven years to dispose of "preliminary and incidental questions," what finite mind can measure the time required to dispose of the merits?

In view of this *assumption* in the opening lines of the brief, we deem it proper to review at the outset of the discussion the history of this controversy so far as it bears upon the questions now at issue.

In the bill of complaint filed by the said appellant in the said chancery court of Warren county, hereinbefore mentioned, it was distinctly alleged (Record, p. 52):

"That the rate prescribed in said contract (the one involved in this case) for the use of said hydrants, and the

rates charged by said company against domestic consumers are *exorbitant and illegal* and said board (the appellant) exceeded its power and authority in making any contract stipulating for the period aforesaid said rates.

"That the said Mayor and Aldermen had no right or power to make such contract; that an exclusive grant or monopoly of the kind is in contravention of the public policy of the State and is illegal and void.

"Complainants further show that the contract entered into with Samuel R. Bullock and Company on the 18th day of November, 1886, is null and void and the attempt by said Mayor and Aldermen to make such contract was a gross abuse of their rights and powers" (Record, p. 51).

This bill of complaint in the State court was made Exhibit "Y" to the original bill of complaint filed by the appellee against the appellant in February, 1901, in the Circuit Court of the United States for the Southern District of Mississippi, and which is numbered forty-one (41).

In this bill it is charged:

"And your orator further shows that said suit was commenced by the City of Vicksburg in the chancery court of Warren county, Mississippi, to have declared void said ordinance or contract your orator has with the city. * * * A petition for the removal of said suit to this court was filed by complainant herein because it involved a Federal question and the same is now pending in this court upon motion to remand; a copy of the bill of complaint is herewith filed and marked Exhibit 'Y' and prayed to be made a part hereof."

That this bill of complaint in the State court has been a subject of judicial examination in the litigation in the Federal court is evident. This court in Vicksburg Water Works Company *v.* Vicksburg, 185 U. S., pp. 65 and 79, referring to this original bill of complaint filed in February, 1901, says:

"The bill further alleges that on December 7th, 1900, the city filed a bill in the chancery court of Warren county,

State of Mississippi, against the Vicksburg Water Supply Company, and the Vicksburg Water Works Company, averring, among other things, that the contract entered into with Samuel R. Bullock & Company was null and void, and the attempt by said Mayor and Aldermen was a gross abuse of their rights and powers; that the said Mayor and Aldermen had no right to make a contract for so long a period as thirty years, and beyond their official terms to bind the constituted authorities to pay rents for the said hydrants as therein stipulated; *that the rates prescribed in said contract for the use of said hydrants and the rates charged by said company against domestic consumers are exorbitant and illegal, and said board exceeded its power and authority in making a contract stipulating during the period aforesaid for said rates.*" (Italics ours.)

Again, this court said on the next hearing of the said case (Vicksburg *v.* Vicksburg Water Works Company, 202 U. S., 453 and 459):

"A bill was filed in the equity court in Warren county, Mississippi, averring that the original contract to which the Water Works Company claimed to have succeeded was null and void; that the Mayor and Aldermen had exceeded their powers in making the contract for thirty years; *that the rates charged to consumers were exorbitant and illegal;* that the Mayor and Aldermen, at a meeting held on November 5, 1900, had resolved that the city no longer recognized any liability under said contract; that the Vicksburg Water Supply Company (a former holder of said contract) and the complainant had no rights in said contract, and the city was entitled to have the same cancelled and annulled." (Italics ours.)

Thus it cannot be questioned that appellant, the originator of this long-drawn-out litigation, had at the very inception of the controversy *denounced* the rates, *both for hydrants* and to private consumers, as *exorbitant and illegal* and beyond the power of the city to make.

This court, in 185 U. S., pp. 65 and 69, also specially says:

"The bill (of complainant) further alleged that the Mayor and Aldermen deny any liability upon any contract for the use of the water-works hydrants."

Appellee, by its amended and supplemental bill in suit No. 41, filed April 21, 1901, (Record, pp. 61 to 64, inclusive), distinctly averred, among other things, as follows:

"3rd. Your orator would further show, as before stated in the original bill of complaint in this cause, the defendant caused its charter to be amended by the legislature of the State of Mississippi in 1886, to provide for the erection and maintenance of a water-works system to supply the said city with water or to contract with party or parties who should build and operate water works, and the city having elected to enter into a contract with S. R. Bullock & Company and assigns, on the — day of November, 1886, to *provide* the *defendant, the city, and inhabitants thereof with water for public and domestic purposes for thirty (30) years, at a stipulated price as agreed upon in said ordinance.*" (Italics ours.) "Therefore, said city by its contract and ordinance * * * are precluded from issuing and selling bonds to build, construct, maintain and operate a water works of its own * * * in competition with your orator against its own contract."

This amended and supplemental bill is made an exhibit to the bill of complaint now under consideration in this court, being designated as No. 79.

In said original bill complainant prayed:

"That the defendant may be enjoined, perpetually, from assuming to abrogate and take away the franchises and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business," etc. (Record, pp. 19-20).

Also:

"May it please your honors to grant unto your orators a writ of injunction, issuing out of this honorable court under the seal thereof, directed to the defendant, its officers, attorneys and servants and each of them, enjoining and restraining them from assuming to abrogate and take away the franchises and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business," etc. (Record, p. 20).

To the said original bill in suit No. 41 and said amended supplemental bill the defendant, then, the appellant now, interposed what was designated by it as an answer. This answer appears on pages 70 to 84, both inclusive, of the record.

On page 70 the answer commences as follows:

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

"VICKSBURG WATER WORKS COMPANY
vs.
"THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

"*The Answer of the Mayor and Aldermen of the City of Vicksburg to the Original and Supplemental Bill of Complaint Exhibited against Them in this Court by the Complainant Named Therein.*

"For such answer to so much and such parts of said bill as they are advised it is material or necessary for them to answer, these respondents say:"

The respondents then undertake to set forth their views of the controversy, and to plead their defenses in detail and at length, and on page 77 of the record the following allegations of their answer appear:

"Your respondents admit that the averments in said bill that an act of the legislature was passed authorizing the City

of Vicksburg to issue bonds * * * but respondents say the question of liability of the city to complainant by virtue of the contract entered into with Samuel R. Bullock & Company, which is raised by said resolution, is altogether aside from the scheme and purpose of becoming the owners by purchase or otherwise of a system of water works. THEY SAY THAT SAID ALLEGED CONTRACT WITH SAMUEL R. BULLOCK & COMPANY, IMPOSES UPON THE INHABITANTS OF VICKSBURG AND ITS CORPORATE AUTHORITIES AN ONEROUS AND EXTORTIONATE BURDEN; THAT NO SUCH CONTRACT WOULD NOW BE MADE WITH THE SAID VICKSBURG WATER WORKS COMPANY OR ANY OTHER COMPANY AT THE RATES PRESCRIBED IN SAID ORDINANCE; THAT THEY FAR EXCEED THE AVERAGE PRICE CHARGED FOR WATER IN CITIES SITUATED IN LIKE CONDITION AND CIRCUMSTANCES TO VICKSBURG." (Capitals ours.)

Again (same page):

"That it is immaterial whether the said act of the legislature had been passed or not, or whether your respondents desire to become the owners of water works, it would still be and is the obligation on the part of these respondents, in the discharge of their public duties, TO DENY THAT THEY ARE BOUND TO SAID COMPLAINANTS BY SAID CONTRACT, FOR THEY ARE INFORMED AND BELIEVE AND NOW CHARGE THE FACT, FOR THE MANY REASONS HEREIN SET FORTH, THAT NO LIABILITY EXISTS ON THE PART OF SAID CITY BY REASON OF SAID CONTRACT." (Capitals ours.)

Among the reasons set forth in said answer is the above allegation that said contract imposed upon the inhabitants of Vicksburg an onerous and extortionate burden.

It may be noted in passing that among the other matters disclosed by the record is the peculiarity of the appellant's pleadings. It has no hesitation in demurring and answering at the same time, and on page 83 of the record, containing

a continuation of the said answer, the appellant makes the following averments:

"Respondents, further answering, say that the matters and things contained in complainant's amended and supplemental bill are irrelevant, and immaterial and afford no ground of relief to the complainant, and their legal sufficiency is now submitted to the court and judgment thereof is craved as if formally demurred to."

And then, apparently being somewhat dissatisfied with this challenge of the legal sufficiency of the amended and supplemental bills, appellant, continuing to answer, further says (Record, p. 83):

"And respondents, further answering, say that there does not appear any ground for the equitable relief sought by the complainant by reason of the matters and things averred in its original and amended bills; and now, having fully answered, defendants pray to be dismissed hence with their reasonable costs and with damages," etc.

This answer, although oath was waived, was sworn to and filed on June 21, 1901.

The said answer also admits "that a suit was instituted in the chancery court of Warren county, Mississippi, against complainant to have such contract declared void."

It will be thus observed that the appellant has never hesitated to assert with fullness and emphasis that the rates were illegal, extortionate, or exorbitant, and that the city was without power to make the contract authorizing such rates, and that in all the pleadings of the respondent, or the appellant, these issues were injected by it in some form, whenever an opportunity to do so was presented.

In the original bill of complaint, No. 41, as aforesaid, the *entire contract* between the Mayor and Aldermen of the City of Vicksburg and S. R. Bullock & Company was made an exhibit, under the designation of Exhibit "B," and this contract in its entirety has been therefore constantly before, not

only the lower court, but this court, when the adjudications in favor of appellee were made. This contract expressly authorized S. R. Bullock & Company and assigns, as stated in the amended and supplemental bill, to supply water to the city of Vicksburg, in Warren county, Mississippi, and its inhabitants, and this contract appellee owns.

By section 3 it is stipulated that the rental for the first one hundred hydrants shall be at the rate of $65 per annum, and all in excess of one hundred shall be supplied at an annual rental of $50.

Section 13 is as follows (Record, p. 28):

"The said Sam'l R. Bullock & Co., their associates, successors or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works and to make such rates and charges for the use of said water as they may determine, provided that said rates and charges shall not exceed fifty cents for each thousand gallons of water."

The city having in its own original bill made a violent attack upon the *rates prescribed in the contract,* and having repeated, in effect, said charge in its answer to the original and amended bills in No. 41, the appellee thought it proper to meet this accusation *once for all,* although the *burden rested upon the appellant to prove the allegation.*

Therefore Mr. M. C. Crumpler, the manager of the appellee's water-works system, when on the witness stand February 29, 1904, was asked:

Int. 32. "Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer" (Record, p. 263).

Mr. Crumpler, in responding to this interrogatory, says, among other things (Record, p. 268):

"A. The hydrant rentals and rates named in the contract between the city and the water works company, and the regulations as per Exhibit 'H,' a part of this deposition, are reasonable, and I have examined the city records to ascertain if there were any minutes, resolutions or ordinances of any kind, complaining of or notifying the water company or any of its predecessors, that the contract between the city and S. R. Bullock & Company was not being complied with in any particular, prior to November 7th, 1900, and I find there is none; and the city clerk also tells me that there is nothing prior to that time."

That the appellant regarded Mr. Crumpler as an important witness is evident from the fact that it propounded to him *240 cross-questions*, and all these cross-interrogatories appear on pages 269 to 290, both inclusive, of the record.

It is apparent that the attorneys for the appellant were closely scrutinizing Mr. Crumpler's answers, for after they had given utterance to 238 cross-interrogatories they concluded to call attention to Mr. Crumpler's answer to interrogatory 32, from which we have hereinabove quoted, for they asked Mr. Crumpler:

"Q. I notice, Mr. Crumpler, you say in your answer to direct interrogatory No. 32, that 'our company has to use a good deal more coagulants to filter and purify water than it would if the sewer discharge was not let out at a point above our pumping station, thereby making it cost a great deal more to operate the filter plant.' Do I understand from this that part of the sewerage matter of the city of Vicksburg is pumped into your settling basins?"

to which Mr. Crumpler answered:

"A. I don't think there is any question but what that is true, and too true to be good."

All of this appears on page 290 of the record.

Therefore it is evident that the city not only willingly

abandoned any attempt on its own part to prove that the domestic rates were extortionate and illegal, but when they had an opportunity to interrogate Mr. Crumpler upon that subject, and when he had unqualifiedly stated that the hydrant rentals and rates named in the contract were reasonable, they passed this testimony by in silence. Exhibit "H," to which Mr. Crumpler refers and which is made a part of his deposition, appears on pages 303 and 304 of the record.

We deem it unnecessary to present this exhibit in full, but we call the court's attention to the following terms and regulations therein contained:

"Per 100 gallons:

"Domestic or residence and commercial meter rates for a daily average consumption of 1,000 gallons or less ..... 4½c.
"From 1,000 to 2,500 gallons or less ..... 3½c.
" " 2,500 to 5,000 gallons or less ..... 2½c.
" " 5,000 to 10,000 gallons or less ..... 2c.
" " 10,000 to 25,000 gallons or less ..... 1½c.
" " 25,000 to any amount upwards ..... 1¼c.

"Regulation.—For each premises of an average daily amount of not less than 150 gallons, or 6¾ cents for residences, and 185 gallons, or 8⅓ cents for commercial uses. These amounts cover all expense of reading meter monthly, together with cleaning and light repairs of meter by the Water Company when necessary. Customers to furnish meter."

Then follow explicit directions how to test the meter, and concludes (Record, p. 304):

"The intention of the above is to put it into the hands of every consumer to satisfy himself of the accuracy of his bill at any time."

It is therefore beyond dispute, we submit, that not only did the city itself put in issue the right to charge the rates prescribed by section 13 of the contract, but assumed the

affirmative, and expressly denounced said rates as illegal, onerous, and exorbitant and far in excess of the rates charged in other cities the size of Vicksburg; and yet, when put to the test, the city not only absolutely failed to meet this charge with proof, but practically abandoned its contention in this respect and permitted Mr. Crumpler's testimony to stand unchallenged.

It is apparent from Mr. Crumpler's testimony that, notwithstanding his company was vested with the power to charge 50 cents per thousand gallons, that his charges as above set forth only ranged from 45 cents per thousand gallons down to 12½ cents per thousand gallons, and that his monthly minimum charge was $2 for residence and $2.50 for commercial uses, which charge, however, covered all expense for the reading of the meter monthly, "together with cleaning and light repairing of meters by the Water Company when necessary."

Thus the Water Company, without any obligation on its part to do so, assumed the burden of proving the reasonableness of its rates, and the city, by its silence and failure to introduce proof, under all the rules of fairness and common justice and law, must be held to have confessed that said rates were legal, reasonable, and proper.

The act of the Legislature of the State of Mississippi approved March 19, 1904 (hereinafter set out), authorizing the regulation of rates by municipalities in certain cases, became effective on the day of its approval, and therefore was in full force for *60 days* prior to the decree of May 18, 1904, and *46 days before the testimony of appellant closed*—a fact of which the learned court below, as well as this court, had judicial knowledge, and if available at all to appellant it was available *on the day* it became a law, and it was *then* the duty of appellant to make it available, and not to remain passive or indifferent and assume the risk of an adverse decree with the confident expectation of destroying that decree by thereafter pointing to a law as a defense, or

interposing it as a shield or weapon to the enforcement of said decree, which was binding, if binding at all, upon all parties, and, as stated, available to appellant many days before the rendition of that decree.

Appellant also charged in its answer in case No. 79 (Record, pp. 384-385): "That in the early part of 1903, and after the first of January, complainant *increased its charges*, so that they were made exorbitant and unreasonable, and these rates are the ones now sought to be enforced by it."

Again: If any of its patrons failed to pay the rates demanded from January 1, 1904, "it was because they were unreasonable and unjust, and because said patrons were advised and believed that they were under no obligation to pay unreasonable rates."

The city had already contended in its bill, filed in December, 1900, and in its answer in case 41, in July, 1901, that the rates were illegal, extortionate, or exorbitant *before* the alleged increase "in the *early part* of 1903;" so these allegations by frequent reiteration, without proof, have lost potency and vigor; and yet the answer in case numbered 79, because sworn to, and without other support, is relied on, as will be hereinafter shown, by appellant to show the rates were unreasonable. Yet Mr. Crumpler, *fully a year* after said alleged increase in rates, *proved* without challenge or contradiction that appellee's rates were reasonable. (See Crumpler's deposition, February 28, 1904—Record, pp. 269 to 304.) And still appellant again sought to reopen the controversy, settled by a final decree, by a suit in the State court, and also again in the Federal court.

Appellant should not be permitted to remain dormant and acquiescent in a Federal court of competent jurisdiction, which recognized and upheld the contract, with the expectation, if the decree was unsatisfactory, of *rescinding* it by appeal to a State court, as it sought to do in its bill filed in the chancery court of Warren county, Mississippi, January 9, 1905, made Exhibit A to its answer (Record, pp.

386-391), or of renewing the litigation in that Federal court, as it vainly attempted to do in said answer.

When, therefore, case No. 41 reached a final determination in the circuit court, the testimony of Mr. Crumpler was before that learned court, and the failure of the city to introduce any sort of proof to show that the rates were unreasonable was conspicuously apparent to that learned court; and the failure of the city to point out any "inherent want of legal validity" in the contract, as required by this court in Vicksburg Water Works Company *v.* Vicksburg, 185 U. S., p. 65, was also noticeable; and the learned court below, in view of this glaring failure of the city to maintain any of its numerous pretended defenses to the contract, so far as the facts are concerned, and its failure to appeal to any law annulling or impairing the said contract, decreed, among other things, as follows (Record, pp. 3 and 4):

"First. That the defendants, The Mayor and Aldermen of the City of Vicksburg, be and are hereby perpetually enjoined from abrogating and taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant *under* and by virtue of the ordinance of November 19th, 1886.

"Second. That said ordinance, contract and franchise be and is hereby decreed and held to be in every respect legal, valid and enforceable, and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise *in any of its parts*, or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder." (Italics ours.)

"Sixth. That the said defendant be and is hereby required to pay all moneys due or owing, or that may hereafter be due and owing to said complainant under and by virtue of said ordinance, contract and franchise.

"Seventh. That the said defendant be and is hereby perpetually enjoined from making or adopting any resolutions, or ordinance refusing to pay the contract price of water fixed by said ordinance, contract and franchise until the expiration of the period prescribed in said ordinance, contract and franchise."

This decree was rendered on the 18th day of May, 1904. From that decree an appeal was prosecuted to this court, as will be shown in Vicksburg *v.* Vicksburg Water Works Company, 202 U. S., p. 453.

This court, after referring to its former opinion, says (p. 460):

"Upon the case going back to the circuit court an answer was filed raising issues as to whether the complainant had accepted and performed the agreement in its contract to supply water to the city, and denying the right of the complainant to have and to own the contract, and the authority of the city to make an exclusive contract, and detailing other matters not necessary to further set forth.

"Certain questions of fact as to the character of the water supplies by the complainant, the pressure maintained, and SIMILAR QUESTIONS WERE DECIDED BY THE CIRCUIT COURT IN FAVOR OF THE APPELLEES." (Capitals ours.)

Among the "similar questions," we submit, were *the rates and regulations*. In the "rejoinder brief for the appellee on the merits," the counsel for the appellee, among other things, contended:

"We submit it was proved beyond successful denial—

"First.

"THE QUALITY

"of the water was of the best character.

"Second.

"THE QUANTITY AND THE PRESSURE

"in every respect satisfied the terms of the franchise.

"Third.

"THE RATES AND REGULATIONS

"were by the uncontroverted testimony shown to be reasonable, and for all practical purposes the appellant made no effort to dispute the fact thus established by proof, that they were reasonable."

This court then concludes, referring to the "similar questions":

"AN EXAMINATION OF THE RECORD MAKES IT SUFFICIENT FOR US TO SAY THAT WE FIND NO REASON FOR DISTURBING THE CONCLUSION OF THE CIRCUIT COURT UPON THESE QUESTIONS" (Record, p. 460).

We again submit that these "similar questions" embraced the *rates* and *regulations*.

This court thus announced its conclusion (p. 472):

"We find no error in the decree of the circuit court *enforcing the contract rights of the complainant* and enjoining the city from erecting its own works during the term of the contract but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and, as so modified, affirmed." (Italics ours.)

Under this decree the mandate of this court, when forwarded to the court below, necessarily directed the attention of the court below to the fact that its decree was thus *affirmed,* except so far as the mandatory injunction was concerned, and that the terms of the decree should therefore be enforced.

When the case reached this court on the second appeal, being the appeal from the final decree, an opportunity was given the city to point out some "inherent want of legal validity" in the said contract, or to furnish some reason based upon the facts why the court below erred in restraining the defendant from rescinding or denying liability under said contract or any of its parts, or from disturbing or interfering with the rights of complainant thereunder, or from making ordinances or resolutions refusing to pay the contract price fixed by said ordinance or franchise, or from refusing to pay hydrant rentals; and the city, *then* as *now,* argued that the *rates* were subject to regulation; that the act

of the legislature of the State of Mississippi approved March 19, 1904, and the constitution of 1890 were applicable.

The city on the second appeal filed seven assignments of error, but four of them, being a majority thereof, were, however, so transparently without merit that they required no extended consideration and were adjudged insufficient.

The fifth assignment of error was as follows:

"The said court erred in rendering a final decree against respondent, because the said decree is contrary to the law and the facts as stated in the pleadings and proof above set out."

Under this assignment the city had, as stated, an opportunity to point out any "inherent invalidity of the contract" presented by it to the court below, or to show wherein the court erred on the facts; but before this court, as to the facts the city was practically mute, and contented itself in discussing what it then considered were the only matters of vital importance remaining at issue, as above shown.

We have thus shown, we submit, that the power of the Water Works Company under section 13 of the contract and the reasonableness of its rates were directly challenged in the pleadings, and that the said contract, including section 13, was upheld by the court below, and the rates found reasonable, and that the decree of the court below was in all respects except one *affirmed* here. It is therefore extremely difficult to understand how it can be contended that in all these proceedings *the merits have been ignored* and only "preliminary and incidental" questions decided, as assumed in the first few lines of the brief of the appellant.

But we will pursue the history of the case further, as developed by the opinions of this court.

When the case first reached this court, it is true a *question of jurisdiction was presented;* but in the determination of the question of jurisdiction the court necessarily made an investigation of the merits—to a certain extent, at least. In

order to ascertain whether the circuit court had jurisdiction, it became necessary to determine whether there was a contract—a legal contract, a binding contract—in existence, which had been assailed by the city authorities. If no such contract existed, there was no merit in the contention presented by the original bill and the jurisdiction could not attach. It was essential, we repeat, to the jurisdiction, that there should have been a legal and binding contract *in esse*, and therefore this court set out the contract in full in its opinion and necessarily made an investigation thereof.

This court says (185 U. S., p. 81):

"After the lapse of that long period (nearly fourteen years) and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid, because in excess of its powers to contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the complainant for the custom of the consumers of water."

The Court further said, (page 80):

"The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant," etc.

Further:

"It cannot be seriously contended that under the act of March 18th, 1886, authorizing the city to provide for the erection and maintenance of a system of water works, and to contract with a party or parties to build and operate water works, and under the ordinance of the city of November 18, 1886, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; THE TERMS WERE EXPLICITLY SET FORTH IN THE ORDINANCE; THE WORKS ERECTED WERE APPROVED BY THE CITY AND THE RESPECTIVE OB-

LIGATIONS CREATED BY THE CONTRACT WERE DULY COMPLIED WITH, WITHOUT QUESTION OR COMPLAINT, FOR A PERIOD OF FOURTEEN YEARS." (Capitals ours.)

So, then, when the contract as *an entirety* was under consideration by this court on the very first appeal, it was adjudicated that "the subject-matter of the contract was within the powers of the city to make," and that "the terms were explicitly set forth in the ordinance," and that it could not be seriously contended that under the act of the legislature and the ordinance of the city "no contract was entered into."

Therefore, in the early history of this controversy, there is a clear statement that there *was* a contract entered into, and that its subject-matter was within the power of the city to make, and that its terms were explicitly set forth in the ordinance; and this was held, notwithstanding that the city had been contending in its own bill, as quoted by this court, that the Mayor and Aldermen "had no right to make a contract for so long a period as thirty years, and beyond their official terms to bind constituted authorities to pay rents for the said hydrants as therein stipulated; that the rates charged for use of said hydrants against domestic consumers are exorbitant and illegal, and said board exceeded its power and authority in making any contract stipulating during the period aforesaid for said rates."

And then the court held, as shown by its first syllabus:

"By the act of March 18th, 1886, the City of Vicksburg was authorized to provide for the erection and maintenance of a system of water works and the contract made in accordance with its provision was within the power of the city to make, and the subsequent legislation, State and municipal, set forth in the bill, impairs the contract rights of the water company, within the protection of the Constitution of the United States, UNLESS THE CITY CAN POINT TO SOME INHERENT WANT OF LEGAL VALIDITY IN THE CONTRACT." (Capitals ours.)

Thus this court warned the complainant that the contract would stand unless it could point out "some inherent want of legal validity" in the contract, "or to some such disregard by the Water Works Company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract," and the case was remanded for proceedings on its merits.

When it reached the court below, there was not the slightest pretense on the part of the city to "point out the inherent invalidity of the contract," nor was there the slightest effort made to defeat the bill on its merits, so far as the facts are concerned; and, we have shown, we submit, it was proved beyond controversy that the supply, pressure, quantity, and quality of water, as well as the rates and regulations, were not subject to impeachment.

The court below therefore entered the final decree from which we have hereinbefore quoted.

When it again reached this court (202 U. S., p. 453), the city not only failed to "show to the satisfaction of the court any inherent invalidity," or to establish the fact that the court below erred on the facts, as hereinbefore stated, although it undertok to argue *then*, as it is doing *now*, that this contract was absolutely subject to legislative control.

We quote now from brief of counsel for the city, four of them being named in the report, as condensed by the learned reporter, on pages 454 and 455.

The city contends:

"But if the contract was assignable and passed to the Water Works Company without the consent or approval of the appellant, it passed subject to the power of the State to regulate rates whenever it chose to do so, and regulating rates would not impair complainant's contract," (citing Stone *v.* Trust Company, 116 U. S., 636).

2d. "The State could abandon its governmental right and deprive itself of the power to regulate its corporations, but only by apt words, about whose meaning there can be no doubt. The legislative grant by the State to the city does

not evidence any purpose on the part of the State to deprive itself of the power to fix and regulate rates to be charged by the party or parties to whom the contract should be let" (citing, among other cases, Water Company *v.* Fergus, 180 U. S., 624; Stanislaus County *v.* San Joaquin Co., 192 U. S., 201, which cases are again cited in the brief on this appeal).

3d. "Appellee can exercise no powers prohibited by the constitution and laws of Mississippi. Its charter was and is subject to alteration, repeal or amendment, and has been amended by the act of 1904. It cannot complain of any of these laws which were in existence when it accepted its charter. Its rights and privileges are fixed by these laws and the decree of the court, which held, in effect, that they were not, is erroneous" (citing a number of cases, including the cases above mentioned—180 U. S., 702; and 192 U. S., 20).

And in another part of the brief counsel cite the Joplin case, 191 U. S., 150, and the Freeport case, 180 U. S., 587, which is also again urged upon the attention of the court in the present brief.

Yet this court, as we have shown, upheld the decree of the court below in every respect except that part relating to the sewer.

To condense, we submit it cannot be successfully denied that this court has held, first, that there was a valid contract in existence; second, that the subject-matter of the contract was within the corporate power of the city to make; third, that the contract as a whole was set out in the opinion of the court and its terms declared to be explicitly set forth; that the works erected were approved by the city, and the respective obligations created by the contract were duly complied with, without a murmur by complainant, for a period of nearly fourteen years; that the character of the water prescribed was supplied by the company and the quantity required was supplied; that the pressure was maintained, and we submit that the rates and regulations were reasonable; that the constitution of 1890 did not impair this

contract, and that the Vicksburg Water Works Company acquired the contract under the ordinance of 1886 and the laws then in force, and that the constitution of 1890 and the subsequent legislation of the State of Mississippi did not affect the validity of said contract.

Therefore, if we have not reached an *adjudication on the merits,* all this tedious, prolonged, and vexatious litigation can be characterized as an idle ceremony.

It is, however, now gravely contended that this litigation has not ceased; that the Water Works Company has practically acquired no rights of any value throughout these seven long and weary years, except the right to prevent the City of Vicksburg from building a water works of its own and thereby lowering the rates charged by the Water Company and entering into competition for the business of the private consumers, and it is now insisted, notwithstanding all that we have hereinabove enumerated, that the right to charge the rates authorized and prescribed by section 13 of the contract, to wit, not to exceed a maximum of 50 cents per thousand gallons, has never been really vested in this Water Company, or its predecessors, and that under the subsequent ordinances of the City of Vicksburg, approved the 20th day of April, 1904, wherein it attempts to fix and prescribe the maximum rates for use of water in the City of Vicksburg, any effort of the Water Company to enforce its rights under said section 13 subjects it and its officers and agents to fine and imprisonment, so far as a corporation can be imprisoned.

Notwithstanding these two appeals to this court and a final decree in the learned court below on the 18th day of May, 1904, which was affirmed by this court, as stated, the appellant, on the 18th day of April, 1904, passed two ordinances, approved April 20, 1904, one entitled "An ordinance to fix and prescribe maximum rates and charges for water supplied to the City of Vicksburg, where measured by meters, and for other purposes," and the other entitled "An ordinance to fix and prescribe maximum flat rates and charges

for the supply of water to consumers in the City of Vicksburg, and for other purposes." These two ordinances appear on pages 5 and 8, both inclusive, of the record.

By the first ordinance the highest maximum rate allowed was 40 cents per thousand for 100 to 1,000 gallons per day *actually used*, and then on a descending scale the lowest price permitted per thousand gallons and over per day was 15 cents per thousand, all for water *actually used*. A maximum charge of 25 cents per month for inspecting and reading meters was permitted, but all meters "shall be put in, installed, and maintained at the expense of the Water Company, except as to said 25 cents monthly, above allowed."

For failure to comply with this first ordinance, on conviction, the Water Company, its officers or agents, shall be fined not less than $50 nor more than $200, or be imprisoned in the city workhouse or county jail not exceeding thirty days, or both, for such offense.

By the second ordinance it is provided that where no meter has been put in or attached for ascertaining the quantity of water, certain maximum rates are provided, and for failure to comply with this ordinance the Water Company, its officers or agents, on conviction, shall be fined not less than $50, or be imprisoned in the county jail or the city workhouse for not over thirty days for each offense. This ordinance was also approved April 20, 1904, and the date as appears in record, to wit, May 20, 1904, is a typographical error, as clearly shown in the decree now under review.

There was also an ordinance which was approved on the 7th day of December, 1903, which appears on page 8 of the record, which provides for the presentation of bills before a charge can be made for damages, and also provides for a fine in the event of a violation of this ordinance.

It is probable that the two ordinances first above named were passed under the assumption that the city had the right to enforce such ordinances by virtue of an act of the

legislature of the State of Mississippi approved March 19, 1904, which is as follows:

"SECTION 1. *Be it enacted by the legislature of the State of Mississippi,* That the corporate authorities of any city, town or village now or hereafter incorporated under any general or special laws of this State, in which any individual, company or corporation has been or hereafter may be authorized by said city, town or village to supply water, electric light or gas to said city, town or village, or the inhabitants thereof, be and they are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water, electric light or gas furnished by such individual, company or corporation to such city, town or village, or the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges the same may be reviewed and determined by the circuit court of the county in which said city, town or village may be; *Provided,* That this act shall not be construed so as to *impose* (impair) the effect or obligation of any valid or binding contract with any water works company, electric light company, or gas company now existing or heretofore made with any individual, or water company, electric light or gas company."

"SEC. 2. *That this act shall be in force and take effect from and after its passage*" (Act Miss. 1904, p. 231).

The appellee having had its contract sustained, as stated, in both the circuit court and in this court, and finding that it and its officers and agents were liable to be subject to enormous fines and prolonged imprisonment by virtue of said ordinances of April 18, 1904, approved April 20, 1904, on the 7th day of January, 1905, filed its bill of complaint in the Circuit Court of the United States for the Western Division of the Southern District of Mississippi, at Vicksburg, wherein it stated in a narrative form the history of its previous litigation, making as an exhibit to its bill all of the previous pleadings, evidence, and decrees and all the previous pleas and proceedings and setting forth in full the above

three ordinances, and prayed "for an injunction and decree thereon restraining this defendant (the appellant) from attempting to enforce these ordinances passed by the defendant, and annulling the same and holding them for naught, and requiring them to do and perform their contract made in 1886, as aforesaid, in this respect, and from in any manner interfering with your orator's contract rights under said contract." It also prayed for general relief.

On the 11th day of January, 1905, the learned court below granted a temporary restraining order, which appears on page 374 of the record.

On February 4, 1907, the appellant filed a petition which appears on pages 417 and 418 of the record.

On or about February 7, 1905, the appellant filed its answer, which appears on pages from 377 to 385, both inclusive, of the record, and also filed certain exhibits.

On the 24th day of February, 1905, being the vacation, so far as the Circuit Court at Vicksburg is concerned, the learned court below granted a decree perpetuating said injunction, which appears on pages 393 and 394 of the record.

On the 3d day of July, 1905, the appellee filed its general replication, which appears on page 394 of the record.

On the 3d day of January, 1906, being a day of the January term, 1906, of said Circuit Court at Vicksburg, the court rendered its final decree, from which we quote:

"This cause coming on to be finally heard at this January term, 1906, of this court, upon the original bill of complaint, and the answer of the defendant thereto, and all the exhibits which are made such, to said original bill of complaint and said answer and all the other pleas and proceedings in this cause (which necessarily included the said replication), together with a certified copy of the charter of the said Vicksburg Water Works Company, which is filed in the record as evidence in the cause; also the petition of the defendant for a modification of the temporary injunction granted in this cause," etc.

The decree is set forth in full in the record, pages 402, 403.

From this decree appellant prosecuted this appeal, its petition for appeal being filed March 26, 1906.

With said petition it has filed twenty-seven assignments of error. These assignments of error have not been mentioned and argued specifically and in detail by the appellant, and it therefore becomes unnecessary to refer to all of them specifically and in detail in this brief.

ARGUMENT.

We are informed by the brief of appellant, page 29, that "the sole and only basis upon which appellee rests its claim of exemption from the right of the legislature of Mississippi to regulate water rates is section 13 of the ordinance of November 18, 1886, set out in the record, page 28."

We will, however, undertake in our own way to present the contention of appellee.

I.

Res Judicata.

The questions now at issue have already been heretofore conclusively adjudicated and are no longer open for investigation and determination here again.

In other words, we maintain in the very commencement of our argument that all the questions now claimed by appellant as still subject to review are *res judicata*.

We respectfully contend that no case can be properly tried by installments; that no complainant or defendant can speculate with judicial decisions; that when a defendant or complainant once has a standing in court to uphold or to annul a contract or any other solemn undertaking, that it is in-

cumbent upon both parties to the litigation to formulate, present, and seek a final disposition of all material issues involved; that when a contract is presented for consideration in its entirety, and when the owner of the contract prays that the other party to the contract should be prohibited from annulling it, destroying it, or impairing it, if the other party then has any real or substantial defenses known to him upon the basis of which said contract can be assailed, it is the bounden duty of that party to interpose such defenses—not one, but all—and, failing to do so, should not thereafter be permitted to reopen the controversy to interpose defenses known to him and existing at the time the contract is under consideration and an adjudication of its validity is sought.

All this, we respectfully submit, is elementary. But in view of the position taken by the appellant now, assuming without question the right to try this case again upon what it calls the "merits," we deem it proper to refer and cite some of the numerous cases on this branch of the law. The author of the American and English Encyclopædia of Law, vol. 24, pp. 781 and 782 (2d ed.), thus states the law:

"The rule is well settled that a judgment of a court of competent jurisdiction, delivered upon the merits of a cause, is final and conclusive between the parties in a subsequent action upon the same cause, not only as to all matters ACTUALLY LITIGATED AND DETERMINED IN THE FORMER ACTION, BUT ALSO AS TO EVERY GROUND OF RECOVERY OR DEFENSE WHICH MIGHT HAVE BEEN PRESENTED AND DETERMINED THEREIN. This rule is applied both at law and in equity." (Capitals ours.)

He cites under the heading "MATTERS WHICH MIGHT HAVE BEEN LITIGATED" cases decided in England, by this court, and the supreme courts of Alabama, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland,

Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin; and under the heading "MATTERS OF DEFENSE WHICH MIGHT HAVE BEEN PLEADED" cases decided by this court and by the supreme courts of Alabama, Iowa, Mississippi, New York, South Carolina, Utah, and Vermont.

So it would appear that thirty-one States, besides the Federal courts, have given enunciation to this principle.

Among the leading cases in this court is Cromwell *v.* County of Sac, 94 U. S., 351. In that case the court said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter *which might have been offered* for that *purpose*. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground *which might have been presented*, is strictly accurate, when applied to the demand or claim in contro-

versy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." (Italics ours.)

Thus, we have a binding authority that a judgment, and of necessity a decree, "is a finality as to the claim or demand in controversy * * * not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

In this case, as we have shown IN OUR STATEMENT OF THE CASE, the complainant not only prayed for general relief in its original bill, but specifically prayed that the city be enjoined "from assuming to abrogate and take away the franchises and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business, and to destroy its credit, and the value of its property," etc., and asked for a writ, directed to the defendants, "enjoining and restrainmg them from assuming to abrogate and take away the franchises and contract rights of complainant," etc., and in its bill it set out as an exhibit the entire contract, making an exhibit also of the bill of complaint first filed by the city in the State court; and the *answer of defendant*, as well as said bill filed in the State court, set forth and charged the illegality of the contract; the want of power of the city to make such a contract, and expressly maintained that the rates were extortionate and exorbitant. A final decree was rendered, after the issues were presented and proof taken, sustaining the contract as a whole and enjoining the defendant from rescinding or annulling it in any of its parts; and this decree was affirmed by this court (202 U. S., 453).

The *matter in issue*, the *claim of complainant*, was that it had *a contract*— not *a part* of a contract, but *a whole* contract—and that it desired to prevent the city from interfering with *that* contract; and the city, notwithstanding it

had an abundance of opportunity to show, if it could, that the contract was "inherently invalid," and that its charges for water were extortionate and exorbitant, practically submitted to a final judgment without any defense, so far as the proof was concerned, upon the question of the reasonableness of the rates raised by itself, and particularly had an opportunity as shown, to rely on its own two ordinances of April 20, 1904, and said act of March 19, 1904, and never at any time satisfactorily responded to the suggestion of this court to point out any "inherent invalidity in the contract" which could be upheld in a court.

Now, when the contract has been sustained as *a whole*, and not as *a part*—when it has been under review for six or seven years and upheld in every court where it has been assailed—it is sought to *again* assail the contract by alleging in effect that although it has been proven and adjudicated that the rates of the Water Company are reasonable, yet we propose to investigate this matter again at our leisure, and although the contract as a whole has been declared to be legal and valid and binding, yet we now consider that there is some "inherent invalidity" therein, and we now propose to undo what has been done and destroy the contract, by insisting that the city now has the right to regulate the rates therein prescribed.

If this contention can be successfully maintained, it seems to us that the doctrine of *res judicata* is completely emasculated.

The final decree in case No. 41 was rendered, as we have shown, on May 18, 1904. The act of the legislature of the State of Mississippi, under which these alleged ordinances were attempted to be passed, was approved March 19, 1904.

The case in this court was submitted December 13, 1905, fully twenty-one months after the passage of said act of the legislature, and this court, as is stated in the brief of appellant (being among the few things in which we agree with the appellant), "in the exercise of its appellate jurisdic-

tion over the lower courts of the United States, * * * takes judicial knowledge of the laws of all the States."

Liverpool & G. W. Steam Co. *et al. v.* Phœnix Insurance Company, 129 U. S., 445.

Therefore, if the *act* had any material bearing upon the controversy, which we deny, it was available to the city in the lower court, *before the rendition* of the final decree, and therefore available here; and indeed the city, by its city attorney, Mr. H. C. McCabe, *earnestly pressed* upon this court the *question* as again pressed here now, first, that the State of Mississippi had not parted with its right to regulate rates and that this act of 1904, under which said ordinances were sought to be made effective, controlled the contract, and, second, that under the constitution of 1900 the contract was subject to legislative control.

It is pertinent to recall the argument of Mr. McCabe in this connection.

He says (p. 33):

"We contend that it (the contract) passed subject to the sovereign right and power of the State of Mississippi to fix and regulate rates to be charged to the city AND TO THE INDIVIDUAL CONSUMERS OF WATER WHENEVER IT CHOSE TO DO SO, AND THE FIXING AND REGULATING OF SUCH RATES WOULD NOT IMPAIR COMPLAINANT'S CONTRACT" (Capitals ours), citing Stone *v.* Farmers' Loan & Trust Company, 116 U. S., 636, and Providence Bank v. Billings, 14 Peters, 514.

Again, he says (p. 33):

"Of course the State could, if it desired to do so, abandon its GOVERNMENTAL right and deprive itself of the power to regulate its corporations, but it must be done by apt words, about whose meaning there can be no doubt; and we insist that the legislative grant by the State to the City of Vicksburg 'to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract with the party or parties to build and operate

a water works,' does not evidence any desire or purpose on the part of the State of Mississippi to deprive itself of the power to fix and regulate rates to be charged by the party or parties to whom the contract should be let to build and operate a water works. This contention is, we believe, sustained by the following authorities:

"Collins *v.* Sherman, 31 Miss., 679.
"Vol. 9, Rose's Notes, 29 (Mun. *v.* Ill., 94 U. S., 114).
"R. R. *v.* Stone, 116 U. S., 307-347.
"Norfolk *v.* Pendleton, 156 U. S., 667.
"San Diego *v.* National City, 174 U. S., 739.
"Owensboro *v.* Owensboro W. W. Co., 191 U. S., 358.
"Rogers Park Water Co. *v.* Fergus (1900), 180 U. S., 624.
"Stanislaus County *v.* San Joaquin C. & I. Co., 192 U. S., 201.
"Rushville *v.* Rushville, 15 L. R. A., 321, and note, 322.
"Knoxville W. W. Co. *v.* Knoxville, 189 U. S., 434."

It is significant to notice that these precise contentions are again made here on *this* appeal, and a number of these cases, particularly the Rogers Park Water Co. *v.* Fergus case and Stanislaus County *v.* San Joaquin C. & I. case, 192 U. S., 201, are again relied upon here.

Mr. McCabe gives emphasis to his argument by inserting in capital letters the glaring head-lines "THE RIGHT TO REGULATE RATES," but Mr. McCabe did not stop here. He introduced another head-line into his brief and designated it as follows:

"ON THE POWER OF COMPLAINANT TO HOLD A CONTRACT NOT SUBJECT TO LEGISLATION BY THE STATE,"

and then cited section 178, article 7, of the constitution of Mississippi of November 1, 1890, and said act of the legislature of the State of Mississippi of 1904 (the last clause of section 2 being inadvertently omitted), and he says (p. 35):

"If the appellee corporation came into existence under the constitution of 1890, and the municipal chapter of the State of Mississippi, enacted in 1892, it can exercise no powers, and no rights which are prohibited by the constitution and laws of Mississippi" (and maintained that it did come into existence after the constitution of 1890 was in force).

Again he says (p. 35):

"Moreover its charter was and is subject to alteration, repeal or amendment, and has been amended by the act of 1904 above quoted. It cannot complain of any of these laws which were in existence when it accepted its charter. Its rights and privileges are fixed by these laws, and the decree of the court which held, in effect, that they were not is erroneous, as will be abundantly shown, we think, by the subjoined authorities" (citing, among others, the Rogers Park Water Co. case; County of Stanislaus; Y. & M. V. R. R. Co. *v.* Adams, 180 U. S., 1, and, singular to relate, Walla Walla Water Company, 172 U. S., 1).

If the decree of the learned court below were erroneous because that learned court did not give effect to the act of 1904, which was in effect nearly two months before the final decree was rendered, and the Constitution of 1890, as Mr. McCabe so earnestly argued, then this court would have reversed this decree and this litigation would then have ended; but, notwithstanding said argument of Mr. McCabe and his citation of all these cases, some of which are again cited here, this court sustained the decree of the court below, which, as we have shown, in substance perpetually enjoined the city from "abrogating and taking away, or from assuming to abrogate or take away the franchises or contract rights of complainant" under the ordinance of November 19, 1886, which was marked Exhibit "B" to the original bill, and which held "said ordinance, contract, and franchise to be in every respect legal, valid and enforceable and binding upon said defendant," and "perpetually enjoining said defendant from infringing, ignoring, rescinding, or denying

liability under said ordinance or any of its parts," or "from disturbing or interfering with" said "rights, benefits, and privileges acquired by complainant thereunder;" and "enjoining the city from making or adopting ordinances and resolutions refusing to pay the contract price of water fixed by said ordinance, contract, and franchise until the expiration of the period prescribed in said ordinance, contract, and franchise;" and this court, in affirming this decree, said (202 U. S., page 472):

"We find no error in the decree of the circuit court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and as so modified AFFIRMED."

That this court duly considered this argument of Mr. McCabe is manifest, for the court says (page 464):

"It is further urged that the Vicksburg Water Works Company was organized after the taking effect of the constitution of Mississippi of 1890; * * * but we think the right of the Vicksburg Water Works Company was acquired under the foreclosure and sale of the contract rights conferred in the ordinance of 1886 and covered in the mortgage, as we have stated. * * * If it be true that the complainant below had a binding contract excluding competition by the city in furnishing a water supply for the period of thirty years, we think it would be a palpable injustice to the stockholders (under that provision of the constitution which prescribes that no injustice shall be done to the stockholders) to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful operation in furnishing water to consumers by the private company."

Can it be doubted that the hydrant rentals which the city refused to pay were in controversy and the city held liable under the decree? And yet these rentals were as much sub-

ject to State regulation as the rates charged individuals if the regulation were held applicable.

If, therefore, we accept the view now urged by the appellant, the decree of the court below, which was affirmed in every respect but one by this court, is, so far as the rights of the Water Works Company in its relations to the private consumers is concerned, meaningless and valueless.

We apprehend that a decree so *plainly written* and so completely responsive to the main and material issues involved in this protracted litigation, cannot now be overthrown by the presentation of the very same arguments heretofore pressed upon the court, and by the citations from the very same cases to which the court has been heretofore referred, or even by the introduction of *new arguments* along the same lines.

It seems to us that the Freeport case and the Rogers Park case and the Owensboro and the Knoxville case and the Stanislaus case have been so frequently quoted, cited, and pleaded in argument in the various water-works cases and in cases of quasi-public corporations that any further citation thereof becomes almost a work of supererogation. They have been analyzed, commented upon, referred to, cited, relied on, and urged in arguments so often that the principles therein announced are *in similar cases involving like* facts for all purposes to be regarded as elementary.

The case of San Antonio Traction Co. *v.* Altgelt, 200 U. S., 304, decided prior to the last decision in this case, is sought to be made available in the argument.

We submit, that case may be regarded as favorable to appellee. It depended upon a law essentially different from the legislation of Mississippi and the facts are not the same as here presented. This court said (page 308):

"An important consideration in this connection is that the alleged contract was made twenty-three years after the constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly it was not deprived of that control by the fact that the

contract was not entered into by the legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises."

The court holding:

"Even though an ordinance extending a franchise may be construed as a contract, it is still subject to the control of the legislature if the constitution of the State then in force provides that no irrevocable or uncontrollable grant of privileges shall be made, and that all privileges granted by the legislature are under its authority, shall be subject to its control; nor is the legislature deprived of this control because the contract was not made by it, but by a municipal corporation, as the latter is for such purpose merely an agency of the State."

When this court and the court below upheld this contract, as shown by the said decree, the principle of every one of those cases was, we submit, fully considered in the determination of the questions adjudicated by the decree. The Knoxville case, 200 U. S., 23 (wherein the Skaneateles case, 184 U. S., 354; Joplin case, 191 U. S., 150; Helena case, 195 U. S., 383, were cited), was especially referred to in the opinion. It may be pertinent to refer to some of the other cases on the subject of *res adjudicata*. This court said in Fayerweather *v.* Ritch, 195 U. S., 276:

1st. "Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present, their evidence, and the question was decided by a court of competent jurisdiction, private right and public welfare both demand that the questions so adjudicated shall, except indirect proceedings for review, be considered as finally settled and conclusive upon the parties."

2d. "Where in an action in a court of competent jurisdiction the validity of certain releases is put in issue by the pleadings, and no judgment can properly be rendered without determining that question, and judgment is rendered against the parties executing the releases, and who were before the trial court, the judgment in effect determines that the releases are valid, and the question of their validity is

res judicata notwithstanding no special findings in regard thereto were made by the trial judge."

In Gunter, Attorney General, *v.* Atlantic Coast Line Railroad Company, 200 U. S., 273, this court held:

"An appearance 'for and on behalf of the State' by the Attorney General pursuant to statutory provisions, in an action brought against county officers, but affecting State revenues, in this case amounted to a waiver by the State of its immunity from suit; and such immunity could not be invoked in an ancillary suit subsequently brought against the successors of the original defendant to enforce the decree.

"A decree of the circuit court of the United States, having jurisdiction of the case and in which the State appeared, that a charter exemption existed in favor of a railroad company by virtue of a contract within the meaning of the impairment-of-obligation clause of the Federal Constitution is binding upon the State as to the existence and effect of the contract during the period of exemption, and the rule that a decree enjoining the collection of a tax is not *res judicata* as to the right to collect for a subsequent year does not apply."

The court said (page 291):

"It is urged that as the taxes, the collection of which the court enjoined, were not for the same years as were the taxes with which the Pegues case was concerned, the Pegues decree was, therefore, not *res judicata*, because it related to a different cause of action. This rests upon the assumption that a decree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year. But the proposition entirely disregards the fact that the decree in the Pegues case, enjoining the collection of the taxes in controversy in that case, was rested upon the ground that there was a contract protected from impairment by the Constitution of the United States, which was as controlling on future taxes as it was upon the particular taxes to which the Pegues suit related. The contention, therefore, simply asserts that a contract right of exemption was beyond the pale of judicial protection, because rights under such contract should never be sanctioned by final judicial action. Besides, the proposition is not open to controversy."

In Groton Bridge & Mfg. Co. *v.* Clark Pressed Brick Co., Circuit Court of Appeals, Eighth Circuit, 136 Fed. Rep., 27, the court held:

"Where, to an action based on a contract for the sale and delivery of brick, the defendant appears and files answer and a counter-claim in the same plea, alleging a breach of the contract claimed by the defendant to have been entered into by the parties, and then bases on such allegations a counter-claim for damages resulting from the alleged breach by the plaintiff, and, when the case is called for trial, fails to appear, and leaves his plea on record without withdrawing it, thereby imposing upon the plaintiff the production of proof to establish its cause of action, and the court proceeds on the evidence to find the issues for the plaintiff on the pleadings, the judgment therein constitutes an estoppel against a subsequent action brought by the defendant in another jurisdiction based on the same state of facts set up in the counter-claim.

"Even if the court rendering such judgment on the failure of the defendant to appear at the trial should have treated the counter-claim as withdrawn, its failure to do so would, at the most, have been only an irregularity in proceeding, and render the judgment liable to attack as void in a collateral proceeding."

Another leading case in this court is Dowell *v.* Applegate, 152 U. S., 327, wherein it was held:

"In a suit by A to subject lands of B to sale in satisfaction of his claims, a decree in the complainant's favor is final, if not appealed from, and B cannot have the same issue retried in an independent suit, based upon a title which he might have set up in the first suit, but did not."

But in this case, as we have shown, the city *insisted in its pleadings* that the contract was illegal and beyond the power of the city to make, and that the rates were unreasonable, or, rather, to use the language employed by the city, "extortionate or exorbitant."

It would hardly be possible to imagine that any one would now deny (although one is almost justified expecting any

claim from appellant in this litigation) that the city is precluded from maintaining that the pressure is insufficient; that the water furnished by the Water Company is impure and unwholesome; that the quantity supplied is not in accordance with the contract; and if the appellant is thus concluded, so far as pressure, quantity, and quality is concerned, there can be no just reason to advance, we submit, why it is not also concluded from impeaching the reasonableness of the rates which it put in issue in its answer, and which *issue* it failed to maintain and allowed complainant, unchallenged, to prove that the *rates were reasonable*.

Therefore if the pressure, quality, and quantity of the water are settled questions, it follows, we submit, beyond discussion that the *reasonableness of the rates* is also settled.

A very interesting case, because it presents a defense based upon a constitutional provision, is that of Howard *v.* City of Huron, decided by the Circuit Court of South Dakota July 17, 1874, and reported in 26 L. R. A., 493, wherein the court held:

"A judgment, if rendered upon the merits, is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which is offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

"The conclusiveness of a judgment upon the rights of the parties does not depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or on confession is, in its nature, just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict."

After the judgment *was* recovered and the writ of mandamus issued, an answer was filed on behalf of the City of Huron, wherein it was averred:

"The defendants further allege that the city council has no power or authority whatever to incur the debt created

by the contract upon which said judgment was obtained; that at the time the contract was signed, and at the time the well was completed and liability incurred, the City of Huron was indebted to more than four per cent. on the valuation of the taxable property of the City of Huron, limited by the law of the State of South Dakota, and was indebted to more than five per cent. on the value of the taxable property of the City of Huron as limited by the constitution of the said State."

The court said (page 500):

"The counsel in his petition lays down the proposition 'that it is well settled that before a debt is put into judgment it is a good defense to plead the constitutional limitation of such indebtedness.' This is undoubtedly a correct proposition of law. But it is this fact, that the constitutional limitation might have been so pleaded as a defense before judgment, though it was not, that renders the judgment conclusive upon the question as to the validity of plaintiff's claim or contract, and the liability of the defendant for its payment."

The court further said (page 502):

"But the record before us is such that we are compelled to give the judgment in this case the conclusive character that judgments ordinarily possess. From that record it appears that plaintiff duly obtained a judgment against the City of Huron upon default; that after more than two years the plaintiff seeks to collect a judgment by mandamus proceedings to compel the city council of that city to levy a tax to pay the same, and that the city now seeks to interpose a defense that could have been made in the action, but which the city failed to make. In our view of the case, the city is concluded by the judgment and cannot now interpose any such defense. It has had its day in court and it has allowed the time for interposing its defense to pass. It cannot now be permitted to plead a defense it might have pleaded at the proper time, but declined or neglected to do. It cannot now be heard to say that the contract upon which the judgment is claimed to have been founded was not a valid and binding contract against the city. The judgment estops the city from asserting the fact to be otherwise."

If, therefore, a city permits a judgment to be recovered against it by default when it has a previous defense authorized by the constitution of the State wherein the city is located, cannot reply upon such constitutional defense upon an action or proceeding on said judgment, how can a city which has been in court fully six years, contending, maintaining, arguing, and pleading that the contract which it seeks to annul is illegal, and therefore void, and that the rates charged to private consumers are extortionate and exorbitant, and in the Supreme Court urge upon the attention of the court legislation of the State and the State constitution, which it maintains authorizes the city to annul, impair, or rescind said contract, which it contends deprives the owners of said contract of its main value, the right to stand by the *fixed contract* price, the material consideration of the contract, and which largely induced it to expend its money in building a water-works system; and when on the trial of the case it fails to show wherein the contract is illegal, and introduces no proof to show that the rates are extortionate or exorbitant, and permits the water works company holding the contract, unchallenged, to establish the reasonableness of the rates to private consumers—how can that city, after decree is rendered against it by the learned circuit court and affirmed again by the Supreme Court, prohibiting it from interfering with said contract and the *contract* price, undertake with any hope of success to destroy said contract by *again* pleading what it had already pleaded, and by again trying to prove what it heretofore failed to prove, or by pleading something it never had pleaded, when, as we have shown, in the City of Huron case, a municipality is precluded from defeating or disputing a judgment against it *simply* because it *was silent* when the judgment was rendered, and not, as in this case, clamoring for relief throughout the entire proceeding, when it, the City of Huron, had a perfect defense under the constitution?

In the note to this Huron case the editor says:

"The conclusiveness of a judgment against the city when questioned in proceedings by mandamus to compel payment thereof is a question of the highest importance, especially when, as in the above case, the judgment is attacked on constitutional grounds, such as that it created an indebtedness for the city which is prohibited by the constitution. As the counsel for the city contends, the decision makes it possible to evade this constitutional limitation of indebtedness by collusion or neglect of city officers in permitting the judgment to be entered. But this consideration is not permitted by the court to control the decision. The array of authorities in the briefs and opinions of the court seems to make it undesirable to attempt to add to the subject by annotation."

We therefore respectfully contend that the question now again sought to be litigated has been conclusively settled and determined in the prior proceedings, as hereinbefore set out, and that said city cannot now overthrow the solemn adjudications of the court below as affirmed and sustained by this court.

II.

Contract Valid under the Laws of Mississippi.

We further contend that under the laws of the State of Mississippi, as construed by the highest court, and under the constitution of 1890, the contract of the Water Works Company is unassailable.

The decision in the Freeport and Rogers Park cases and other cases announcing similar principles must be construed, of course, in the light of the facts involved in those cases. In practically all of those cases, as we understand them, the State courts had either previously construed the statute or the constitution, so far as they related to said cases, and this court felt bound, as a rule, to affirm the conclusions of the State courts in the construction of their own statutes, or under

the State laws or the State constitution there was always reserved to the legislatures the irrevocable right to repeal or amend the statute; and, further, in the States where these cases originated the legislature had the irrevocable power to amend or alter the charter of the corporation organized under and claiming privileges under the State laws.

If a State legislature has reserved to itself the right to amend, repeal, or alter a State statute, and to amend or repeal a corporate charter, it can be readily maintained that by the creation of such a charter or by the enactment of such a law the legislature has not parted with its power to regulate a corporation organized under such laws or to regulate, change, modify, or vary rates authorized under such laws. A corporation which makes a contract under such laws is chargeable with knowledge thereof, and if by so doing it invites destruction by a practical confiscation of its property under a so-called regulation of its rates, it has only itself to blame. When its powers are limited by the law under which it claims a right or privilege, *that law* of course furnishes the measure of its right or privilege, and it cannot be heard to complain if that law operates to its detriment. But in the State of Mississippi, in the year 1886, there was not vested in the legislature the right to appeal, annul, or abrogate a charter procured under the laws then existing. That charter was a contract, and was protected both by the State and the Federal constitutions, and the Supreme Court of the State of Mississippi has not held, so far as we have been able to ascertain, that a charter thus obtained prior to the constitution of 1890 was subject to repeal or amendment unless such right was especially reserved in the act, and the provision of the constitution of 1890 which vested the power in the legislature to repeal or amend corporate charters expressly exempts from its operation any charter then existing and irrevocable, and was mainly intended to be prospective in its operation. The language is as follows:

"The legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and *revocable*, and any that may hereafter be created, whenever, in its opinion, it may be for the public interest to do so: *Provided, however,* That no injustice shall be done to the stockholders." (Italics ours.)

There is here, then, a clear recognition of irrevocable charters and a plain prohibition against interfering with said charters.

The Vicksburg Water Supply Company, the predecessor of the Vicksburg Water Works Company, the appellee, had an irrevocable charter, and its contract with the city, as shown by the opinion of this court in 202 U. S., 453, was not subject to the provisions of the constitution of 1890, and this contract was acquired by the Vicksburg Water Works Company.

It remains, therefore, now to be ascertained, assuming for argument's sake alone that the questions now before the court are not *res judicata*, how contract rights authorized by and depending upon the laws of the State of Mississippi in force prior to the constitution of 1890 were regarded by the Supreme Court of Mississippi, and the conspicuous failure on the part of the appellant in its present brief to refer to any such decisions, affords at least a ground for the argument that such decisions could afford the appellant no aid or comfort.

It is also pertinent to observe how charter provisions are construed by the Supreme Court of the State of Mississippi.

The city of Columbus (Mississippi) was authorized by its charter "to provide the city with water for the use of the fire department, or of the citizens, by water works within or beyond the boundaries thereof."

The mayor and aldermen of Columbus leased its water works for a term of fifteen years to John Mahon. This contract was sought to be rescinded in Mahon *v.* City of Columbus, 58 Mississippi, 310. The court said (page 326):

"The water works of the city of Columbus belonged, not to the mayor and aldermen of the city, but to the citizens. They were erected at heavy expense, out of the public treasury, for the purpose of furnishing a safeguard against fires and a means of supplying water for private persons.

"It is insisted by counsel for the city that the contract was invalid in its inception, because of a failure to stipulate that it should be revocable at the pleasure of the city authorities, the argument being that it was incompetent for the latter to abdicate for themselves and their successors in office that control over the water works which was vested in them for the public good. We are not disposed to adopt this view."

Again, on page 327, the court said:

"The authority being general, and there being no specification as to the manner of operating the works after their erection, we see no reason why it might not be as well done by contract as by hiring employees or electing a manager; and while it would have been the part of wisdom to have stipulated for a removal of the contractor for cause by the city government, we cannot say that the absence of such a provision rendered the contract null."

This seems to be one of the early cases wherein a municipality found it prudent to unload a public utility upon an individual.

On March 10, 1888, there was approved the following act of the legislature (Laws 1888, p. 468):

"SECTION 1. *Be it enacted by the legislature of the State of Mississippi*, That Hon. J. M. Stone, Hon. J. P. Walker, Gen. G. Y. Freeman, Hon. Geo. G. Dillard, and Hon. T. W. Sullivan, be and they are hereby constituted a commission on the part of the State of Mississippi, with full power and authority to contract with any water works company or electric light company or gas company, or each, for a series of years, not exceeding twenty-five, for annual supplies of water, electric lights, or gas lights, or each, reasonably sufficient for public uses in the capital and various humane and charitable institutions of the State of Mississippi, such contract to provide that the yearly cost to be variable, so as not

to exceed in cost in any year the cheapest furnished by any similar company in any of the Southern States with similar surrounding circumstances; that the powers hereby granted shall also extend to the municipal governments of incorporated cities and towns, and the authorities provided by law for the management of the affairs of such cities and towns shall make such contracts for them, after first submitting the proposition to the legally qualified voters of said city or town, and a two-thirds majority thereof voting for same, UNLESS OTHERWISE PROVIDED BY THE PROVISIONS OF THE CHARTER OF ANY CITY OR TOWN." (Capitals ours.)

This act was under consideration and was construed, as well as a ten-year electric light contract, in Reid *v.* Trowbridge, 78 Mississippi 542, to which case we will hereinafter refer.

We desire to call the court's attention, first, to Light, Heat & Water Company *v.* City of Jackson, 73 Mississippi, 598. The city of Jackson is the capital of the State of Mississippi, and by an act of the legislature approved February 29, 1888, about fifteen month *after* the contract between the City of Vicksburg and S. R. Bullock & Company was made, said city was authorized and empowered to contract with any "reliable corporation, association or individual for supplying the said city of Jackson with water and electric or gas lights from year to year," etc.

Acts of the State of Mississippi, p. 234.

We now quote from said case:

"Under the authority of this act the mayor and board of aldermen of said city, on May 11, 1888, entered into a contract with the Light, Heat & Water Company of Jackson, Mississippi," which contract is set out in full in said case. It provides, so far as the material matters in this connection are concerned, substantially as follows:

"That the said water company shall have and maintain at all times for the full period of twenty years from the com-

mencement of operations by its work, a flow of pure, wholesome water proper for drinking and lavatory purposes through its mains. That said company shall not charge to consumers during the continuance of this contract exceeding the following rates, which shall be due in quarterly installments, in advance, and said company shall have the right at will to supply consumers at meter rates instead of assessed rates. The connection between the main and consumer shall be made at the expense of the consumer, and the lowest rate to one consumer, in any case shall be $5.00 per annum.

"RATES.

"The water rents charged by said company to consumers for domestic or manufacturing purposes shall not exceed the average rates charged in other cities in the State of Mississippi, similarly situated and being supplied by a like system. No connections made with mains, however, are to afford an annual rental of less than $5.00.

"10. The said company shall have power and authority to make, adopt and enforce regulations not inconsistent with law for their convenience and security, as well as that of the public in the operation of said works * * * and may require all water-takers to sign a contract to all reasonable regulations as a condition of furnishing water."

By section 12 of said contract it was provided—

* * * "The said city of Jackson hereby grants to said company the exclusive right and privilege to have, maintain and operate the franchises granted by the charter of said company in said city for the full period of twenty-five years from the date of the execution of this contract, subject, however, to prior termination by the right of said city to purchase as in this contract provided; and for the same consideration, and as the same inducement the said city of Jackson hereby rents of said company for the uses herein mentioned, the hydrants hereinbefore described, for and during the full term and period of twenty years from the completion of said works, unless the same shall be sooner terminated, as provided herein. * * * The said city hereby promises to pay to said company, or its order an annual rental of $60.00 per hydrant for each and every of

said eighty public fire hydrants located on said original mains, for the full term and period of twenty years," etc.

"The water-works system contemplated by this contract was shortly afterwards established and went into operation. On October 12, 1895, the city of Jackson filed its bill of complaint, in which it averred and charged that the contract was null and void, because the same undertook to bind the city to pay for water for a period of twenty-five years at a price and rate fixed therein, which was *ultra vires*, the said board not being empowered to make a contract for water except by the year, or 'from year to year.'"

There were other allegations made in said bill not necessary now to consider.

"The Light, Heat & Water Company demurred to the bill, assigning as grounds of demurrer the following:

"1st. The contract mentioned was not void, but valid in law," etc.

"In order to avoid any question as to the necessity for an answer to any part of the bill, and to obtain as soon as possible an authoritative determination of the controlling questions involved, it was agreed between the solicitors of the parties complainant and defendant that the following questions should be considered as raised by the demurrer, to wit:

"WAS THE CONTRACT MADE BY THE CITY AND COMPANY AND SET FORTH IN THE BILL INVALID FOR WANT OF POWER IN THE CITY TO CONTRACT FOR A SERIES OF YEARS?" (Capitals ours.)

The demurrer was overruled and appeal taken to the Supreme Court. Messrs. Calhoun & Green (Mr. Calhoun, of that firm, being now a member of the Supreme Court of Mississippi) insisted in the argument (page 615):

"The time and expense involved in establishing a system of water works and the necessity of permanency to the city, as well as the company in respect to a matter so important to its well being, show that the construction contended for by the appellee could not have been within the legislative intent. The interpretation put upon the act by the appellant is further aided by cotemporaneous legislation, from which it abundantly appears that twenty-five years was not thought

too long a time for such contracts to last (Acts of 1888, p. 468, sec. 2948, Code of 1892)."

Judge J. A. P. Campbell, former Chief Justice of the Supreme Court of the State of Mississippi, also appeared for the Water Works Company, and he argued (page 626):

"That there is not in the statute any restriction on the power to contract for supplying the city with water. The grant is general, full and comprehensive and authorized a contract to secure a supply to the city from year to year—that is, for a series of years—of water, an article of necessity always needed."

And he insists that the words "from year to year" carried "the idea of duration and continuity." He further says:

"This interpretation is strengthened by the nature of the subject to which the grant of power relates, the known conditions under which the act was passed, the necessity it was intended to relieve, and as well by cotemporaneous legislation authorizing contracts for supplying the State and other municipalities with water of equal duration with the one in question" (Acts 1888, p. 468; Code of 1892, sec. 2948).

It will thus be seen that this act of 1888 was pressed upon the attention of the court by both counsel for the Water Company. Counsel for the city also referred to this act of 1888 in their argument.

Among other things they contended as follows:

"The city council cannot bind a municipal corporation by any act which transcends their lawful powers. It is the policy of the law to require of municipal authorities a strict compliance with and observation of their powers. Any doubt or ambiguity arising out of the terms used by the legislature in making a grant of power must be resolved in favor of the public, and a power cannot be exercised where it is not clearly comprehended within the words of the act. The mayor and aldermen having exceeded their powers in making the water contract for the city, it is absolutely void, and all proceedings under it are null. It cannot be enforced by either party to the contract."

The court said:

"In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29th, 1888, we think the contract entered into with the appellant was within the delegation of power so far as the time of its duration is involved. * * * We know that the machinery, mains and appliances required for supplying the city with water are costly to begin with, and are relatively of little value if removed when once located. Permanency of the plant is essential to the realization of any profit in the enterprise, and in cities having no greater population than that of Jackson the use of water for municipal purposes would probably be a prerequisite to secure the investment of the capital necessary to the construction of the plant. The words 'from year to year' relied upon by appellee as limiting the power of the officers of the city to the making of the annual contracts, derived much of their significance from the subject and the nature of the thing contracted for, the character of the body on which the power is conferred, the end to the attainment of which the power is to be exercised, and the extent to which such powers for such purposes are usually conferred.

"A few days after the act was passed, a commission was appointed by the legislature to contract for water for the State institutions, situated in and near the city, for the term of twenty-five years. In this act power was conferred upon all municipalities to enter into contracts, for a term not exceeding twenty-five years, for supplies of water, on a two-thirds affirmative vote of the qualified electors, but the act provided that it should not apply to municipalities whose charters already conferred the power of making contracts for water."

The act to which the court refers is the act of March 10, 1888, above quoted.

Notwithstanding that the legislative grant authorized a contract by its terms "from year to year," the court held:

"A contract made by the authorities of a municipality with a water company for supplying the city with water for

a period of twenty years, is within the power conferred on them by an act of the legislature authorizing them to contract with any reliable corporation for supplying the city with water from year to year, in view of the purpose of the delegation of power, the nature of the body on which it was conferred, the subject-matter of the contract, the large outlay for machinery and appliances, the profit of which was dependent upon the permanency of the enterprise, and THE COTEMPORANEOUS LEGISLATION, FROM WHICH THE INTENT TO AUTHORIZE A CONTRACT OF AS GREAT DURATION AS TWENTY-FIVE YEARS IS DEDUCIBLE." (Capitals ours.)

It will thus be seen that the Supreme Court of the State of Mississippi, notwithstanding this vigorous attack upon the contract and notwithstanding the precise language used for the duration of the contract, to wit, "from year to year," unhesitatingly sustained the contract—not *a part* thereof, but *all* of it—and which included an authority to furnish water to private consumers at a minimum rate of not less than $5 per annum.

This act was again under consideration in Reid *v.* Trowbridge, 78 Mississippi, 542, and we will now quote from that case.

It will be seen that by the Acts of the State of Mississippi, 1884, p. 422, the mayor and aldermen were authorized "to provide for the general welfare of the inhabitants; to provide for the lighting of said city by electric light, or other method." The City of Vicksburg, in the early part of May, 1899 [illegible], made a contract with the Vicksburg Power and Manufacturing Company for lighting the streets of the city by electricity. The city was to pay $100 per annum for each of 125 street lights and the contract was to last ten years. This contract, therefore, was entered into nearly nine years after the constitution of 1890 was in force and about eleven years after the act of March 10, 1888, above mentioned, was approved.

Certain taxpayers of the City of Vicksburg filed a bill against the City of Vicksburg and the said Railroad, Power

and Manufacturing Company in the chancery court of Warren county, May 17, 1899, to enjoin operations under the latter contract for the following causes:

"(1) Under the act of March, 1888, the city could not make such a contract, except after submitting it to the qualified voters.

"(4) It is unreasonable and oppressive.

"(7) In awarding the contract the council acted arbitrarily, without exercising any discretion whatever, which made it illegal."

It may be noted that one of the counsel in the Reid case appeared as counsel in the early proceeding in this court for the city.

The court said:

"In the case before us the question arises, to be first disposed of, whether that board (mayor and aldermen) could under the charter, and under the legislative act of 1888, make a valid contract for electric lighting without advertising for bids, and without submitting it to popular vote."

The court further said (page 54), after quoting the provisions of the charter hereinbefore set out:

"The intent of the legislature to confer the power *without restriction* appears to us to be too plain, from the collocation and order and sequence of the sections and article of the charter act, to admit of obscuration by learned argument about original power. The very last legislative action on the subject, that in the municipal chapter of the Code of 1892, shows that the law-makers thought the power to be one to be conferred or prohibited, because it expressly confers it on cities and towns and prohibits its exercise by villages." (Italics ours.)

The court then refers to said act of 1888, which, as shown, concludes: "Unless otherwise provided by the provision of the charter of any city or town;" and to the act of February 29, 1888, authorizing the city of Jackson to contract for

supplying said city with water, hereinbefore mentioned, and says:

"It is claimed now that the last clause of section 1 of the first quoted of the above acts, that approved March 10, 1888, applied to and modified the charter of the City of Vicksburg so as to make the contract here in controversy void, because not submitted to vote. In order to this result it is claimed that, in the charter of Vicksburg, it is not 'otherwise provided.' WE HOLD UNDER THE PREVIOUS REASONINGS OF THIS OPINION THAT IT IS SO 'OTHERWISE PROVIDED,' BECAUSE THE CHARTER EXPRESSLY CONFERS THE POWER WITHOUT RESTRICTION ON THE MUNICIPAL BOARD AT ANY 'REGULAR OR SPECIAL MEETING.'" (Capitals ours.)

"Besides, in construing the section of the act secondly above quoted this court expressly so held in the case of Light, etc., Co. *v.* Jackson, 73 Mississippi, 644. If the precise point was not made, the omission is quite significant of the opinion of the eminent counsel for appellee in that case that there was nothing in it. Aside from this, the question was at the very root of the cause, and was considered and decided, and it is the exact question in the case at bar, except that this case is somewhat stronger in favor of the power than the case decides.

"By section 3 of the act of February 29, 1888, the Jackson board was 'hereby authorized and empowered to contract,' while by the Vicksburg charter act the board was authorized to so contract 'at any regular or special meeting.' We presume that no charter then existent 'otherwise provided' by an express prohibition of electric lighting without vote. The grant of power without a restriction is to 'otherwise provide.'"

The court therefore held:

"Under the charter of the City of Vicksburg (Laws 1884, page 422) as amended (Laws 1886, p. 694), the municipal authorities had power to make a valid contract for electric lights without advertising for bids and without submitting the matter to a popular vote; and the power was not taken away by the act of March 10, 1888" (Laws 1888, p. 468).

Therefore we have two recent adjudications of the Supreme Court of the State of Mississippi, one expressly sustaining, first, the contract with the city of Jackson for furnishing that city and its inhabitants for twenty-five years a supply of water, fixing both the hydrant rental and the domestic rates, and, second, the other upholding a contract for lighting the City of Vicksburg for ten years, and holding, third, that the act of March 10, 1888, which conferred an express authority to contract for water, electric light, or gas lights for not exceeding twenty-five years at a fixed minimum rate, therefore for a fixed period and at a fixed rate, as construed, expressly recognized that a municipality such as Vicksburg and Jackson was by its charter expressly authorized to make a contract for a fixed period and for a fixed rate, and thus there was a legislative grant to those cities, as construed by the court, that they could make an unvarying and unchangeable rate for the fixed duration of time. There can be no difference, so far as the *right* of a legislature to regulate rates is concerned, between hydrant rentals and domestic rates, and the act of March 19, 1904, does not create any distinction.

The framers of the organic law of ~~1900~~ 1890 recognized the existence of this act, and of the existence of these charters, for they expressly provided, as we have shown, by section 178 of article 7 that "the legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and *revocable*, and any that may hereafter be created;" and further provided, in the interest of fairness, honesty, and common justice, by the schedules of the constitution, as follows:

"That no inconvenience may arise from the changes in the constitution of this State and in order to carry the new constitution into complete operation, it is hereby declared that—

"SECTION 279. ALL CAUSES OF ACTION * * * AND RIGHTS OF INDIVIDUALS AND BODIES CORPORATE, AND OF THE STATE, AND CHARTERS OF INCORPORATION SHALL CONTINUE."

Thus it is clear, we respectfully submit, that the Constitutional Convention did not propose that the rights of bodies corporate vested in them by virtue of contracts with municipalities, and upon the faith of which they had expended large sums of money should be destroyed by any subsequent act of the legislature, and the legislature itself, in the very act under which appellant claims a right, to wit, the act approved March 19, 1904, above set out, expressly provides "THAT THIS ACT SHALL NOT BE CONSTRUED SO AS TO IMPOSE (IMPAIR) THE EFFECT OR OBLIGATION OF ANY VALID OR BINDING CONTRACT WITH ANY WATER WORKS COMPANY, ELECTRIC LIGHT COMPANY OR GAS COMPANY, NOW EXISTING OR HERETOFORE MADE WITH ANY INDIVIDUAL OR WATER COMPANY, ELECTRIC LIGHT OR GAS COMPANY." (Capitals ours.)

Who can doubt, in the light of the decisions in the Reid case and the City of Jackson case, *supra*, that the Water Company and the Light Company both had "valid" and "binding" contracts with a municipality—one for hydrant rentals and the other for electric lights—for an unchangeable price for a fixed period, and that this act of March 19, 1904, *applies to hydrant rentals and electric lights to the same extent as it does to domestic rates.*

Why, therefore, should only the contracts for such domestic rates be affected thereby? The city officials represent the inhabitants of the municipality in making domestic rates in the like manner and in the same capacity as it represents them in contracting for hydrants and lights for the streets, and the inhabitants are bound in any case.

Under the law as enunciated in the Reid and the City of Jackson cases, *supra*, the city had a right to contract for domestic rates, and therefore such contracts were *"valid"* and "binding," and the act of 1904, by its terms, did not apply to them.

The legislature knew it could not impair a contract pro-

tected by the State or Federal constitutions, and therefore to insert a provision in the act that it did not intend to impair such a contract, would be a needless, if not an undignified, performance.

It seems evident, therefore, the legislature proposed to exclude from the operation of the act any "valid" or "binding" contract, whether protected by said constitutions or either of them, and its use of words is significant in this connection.

It not only prohibits any interference with the *obligation* of the contract, but even with the *effect* of the contract.

This act therefore, we submit, PROTECTS, and does not *impair*, appellee's contract.

In all these decisions, acts, and constitutional enactments the court will perceive that the law-makers of the State of Mississippi and the courts were careful to protect, maintain and uphold the integrity of all contracts entered into with municipalities in good faith, and by virtue of which large sums of money had been expended.

It is the rule, we claim, in the State of Mississippi, and has been for many years, that a contract cannot be lightly disturbed, and, to use the language of the Supreme Court in Reid *v.* Trowbridge (*supra*):

"Within its charter powers the board has a discretion independent of courts, and no exercise of it will be held void for unreasonableness unless so gross as to strongly suggest fraud or corruption. The people elect their council and the courts are not chosen members of it."

It seems singular that in a discussion before this court none of these cases has received the slightest attention in the present brief of the appellants. In the very recent case, to which this Water Works Company was a party, not yet reported in the official volumes of the Mississippi Reports, but decided by the Supreme Court of Mississippi June 4, 1906, and reported in 40 Southern Reporter, p. 1011 (Grif-

fith *et al. v.* Vicksburg Water Works Co.), that court made certain rulings which are applicable here.

We do not know who prepared the "statement of the case" which appears prefixed in the opinion, but it is to be noticed that no mention in that "statement of the case" or in the opinion of the court is made of the decision of this court in Vicksburg Water Works Company, vol. 202 U. S., p. 453. The case in this court was decided May 21, 1906, but the decision of the Supreme Court was rendered June 4, 1906, about two weeks before, and it may be reasonable, therefore, to assume that the Supreme Court of the State of Mississippi did not have the opinion of this court before it. The "statement of the case" contains the following matter:

"The lower court [the Circuit Court of the United States] rendered a final decree whereby the city was enjoined, in brief, from undertaking to nullify the contract for hydrant service, from erecting a system of its own, and from contaminating the company's water by the discharge of sewerage into the same above the intake. This litigation and the decree did not raise or decide the question of the power of the city to regulate rates for private consumers."

It seems clear that this "statement of the case" misinterprets the decree, for, as we have shown, the decree perpetually enjoined the defendant from "infringing, ignoring, rescinding, or denying liability under said ordinance, contract, and franchise in any of its parts," &c.

Therefore this "statement of the case," by whomsoever prepared, is evidently incorrect. The interpretation, too, by the court of the matters alone involved in suit No. 41, we submit, is also incorrect, and probably arises from the fact, as stated to us by Mr. Crumpler, the manager of the Water Works Company, that the complete record, including the pleadings and all the evidence in No. 41, was not before the Supreme Court of Mississippi in the Griffith case. That case, however, in its declaration of the public policy of the

State of Mississippi, is to that extent, as that matter was properly before it, binding as an authority. The court said:

"We decline to follow the decision in Griffin *v.* Goldsboro Water Company (N. C.), 30 S. E., 319; 41 L. R. A., 240 (*so confidently relied upon by appellant in this case*), in holding that while a water company which accepts an ordinance by which a maximum rate is fixed is bound, and cannot exceed the same because of its contract, yet such rates are not binding upon consumers, who have a right to litigate against unreasonable charges. This holding, it seems to us, practically denies the power of a company, under a contract embodied in its charter giving the power, so to fix a rate as to bind a private consumer at all. It opens a never-ending and limitless field of litigation. It is well settled that the courts cannot fix a rate; and if, proceeding duly under statutes enacted for that purpose, the municipality cannot do so, or authorize the company by contract to do so, and thereby bind the citizens, then there is no authority by which it can be done.

"The rule is well settled that a municipal corporation represents its citizens in litigation in respect to matter of general interest as to which all citizens and taxpayers have a common and similar interest. * * * It would be an intolerable burden to the courts and to the water company, or to any other quasi-public enterprise similarly conditioned, if, notwithstanding their litigation with the municipality, and a settlement by the courts in such litigation to the extent of the right of such company, the whole question could be reopened at any time, by any private citizen who saw proper to do so, in a controversy over the most tritling amount" (citing quite a number of cases).

The court further said:

"It is not a matter open to serious discussion in this State, since the decision by this court in the case of Stone *v.* Railroad Company, 62 Miss., 607; 52 Am. Rep., 193, decided at the April term, 1885, *and before the act of 1886* (Laws 1886, p. 694, c. 358), amending the charter of Vicksburg, was enacted (AND OF COURSE BEFORE THIS CONTRACT OF NOVEMBER 18TH, 1886, WAS ENTERED INTO) that a quasi-public corporation may have a contract right to fix rates within a certain designated maximum, and that the rates so fixed are

matter of contract guaranteed by the contract clauses of the United States Constitution. In that decision the court was manifestly directing its observations to the binding character of the rates as between the company and the shippers; otherwise, the decision was practically meaningless, and without point. The philosophy of the situation is simple. Granting that the company is lawfully invested with authority to fix its rate, then such rate being so fixed by it within the maximum limit allowed by the charter, or allowed by the duly authorized ordinance, is by the courts presumed to be reasonable; and it is not permissible for each individual citizen, in every controversy that may arise, to have that question, once passed upon by the lawfully constituted public authorities charged with power in the premises, reopened and litigated anew."

The court then further said that it "did not intend to suggest any opinion or decision on the question as to whether section 13 of the ordinance of 1886 * * * was legal and constituted a valid authority to that company or not. That is one of the principal questions which the Federal court must determine in the litigation now pending before it."

We submit that question was determined and concluded by the final decree of May 18, 1904, affirmed by this court in all respects except as to the sewer.

In the syllabus to this case it is stated:

"Where a water company accepts an ordinance by which a maximum rate for water furnished to a city and its inhabitants is fixed, rates fixed by the company not in excess of the maximum are binding on consumers."

This view of the relative rights of municipal authorities and the taxpayers is also the rule in the Federal Courts.

In Spring Valley Water Works Co. *v.* San Francisco *et al.*, 124 Fed. Rep., 574 and 602, the court held:

"In a suit against a municipal corporation and its officers to enjoin the enforcement of an ordinance reducing the rates to be charged by a water company, the defendants represent the rate-payers, who are bound by the proceedings and

by an injunction issued therein" (citing, among other cases, Reagan *v.* Farmers' Loan & Trust Co., 154 U. S., 362; San Diego Land & Town Co. *v.* National City, 174 U. S., 739, and quite a number of other cases in the other Federal courts).

We therefore maintain that under the laws of the State of Mississippi, as interpreted by its highest court, this contract authorizing a charge not exceeding 50 cents per thousand gallons to private consumers is unassailable by any subsequent legislation, and that the cases cited, based upon the statutes and decisions of the courts of other States, have no applicability or relevancy here.

This court, in 202 U. S., 454, as we have shown, has also held that the contract was not affected by the constitution of ~~1890~~ 1890, and if it were a valid contract *in all of its parts* prior to the adoption of the constitution of ~~1890~~ 1890, as we maintain it was, then the constitution of 1890 and the legislature of 1904 does not affect it, *and, we further maintain, was not intended to affect it*, as we have heretofore shown.

It may be pertinent to observe that the Freeport and Rogers Park Company cases referred to by counsel for the city, not only on this appeal, but on the former appeal, involved the construction of certain statutes of the State of Illinois, a State whose legislature possessed the irrevocable right to appeal, alter, or amend any existing law, and, of course, any contract based upon that law.

The act of the legislature of the State of Illinois in force July 1, 1872, authorized cities and villages to contract with a water works company for supply of water for public use for a period not exceeding thirty years, and by another act, also in force July 1, 1872, authorized the city council to provide for a supply of water, or to authorize any person or private corporation to construct and maintain the same (a system of water works) at such rates *as may be fixed by ordinance* and for a period not exceeding thirty years.

In the case at bar even the language is different. The authority as conferred is as follows:

"To provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to *contract* with any party or parties who shall *build* and *operate* water works."

It may be observed that there could not be a profitable *operation* of a water works without the power to fix rates, and there is no *restriction* in this language upon the *power of the city to fix rates.*

In the Freeport case the hydrant rental was also involved, for "in 1896 an ordinance was passed by the city reducing the rentals of the hydrants and rates to consumers to take effect from the date of its passage," and this *ordinance* was upheld by the Supreme Court of Illinois and by this court.

There is no substantial difference, so far as the State is concerned, between a contract for hydrant rental and a contract to furnish water to private consumers; yet, as we understand this proceeding, the right to hydrant rentals is finally determined and is not now questioned, so far as we interpret the argument of appellant in the present appeal.

For it does not appear to us that it is denied that this court has clearly prohibited the city in its affirmance of the decree below, of May 18, 1904, from interfering in any manner with the hydrant rental; yet the act of 1904, if it conferred upon the city the power to regulate the rates of this water company at all, also conferred upon it the power to regulate its hydrant rental, and this act, as we have shown, was in force about two months before the rendition of the said decree and was pressed upon the attention of this court in the former appeal (202 U. S., 454), and with a persistent argument that the contract was subject to *regulation*, and in fact to annulment, because the charter of the company was acquired after the constitution of 1890 was in force, yet this court, as we contend, and apparently admitted by appellant, upheld the hydrant rentals.

III.

The Ordinance of December 8, 1903.

We submit that this ordinance is of no special importance, but nevertheless it is an interference with the rights of the company to make needful rules and regulations under section 13. Much that we have said applies also to this ordinance.

IV.

The Argument of Appellant Based on the Pleadings.

It is also insisted by the appellant that by reason of the fact certain averments were made by the appellant in its answer, and as the answer was made under oath, the unreasonableness of the flat rates, at least, charged by the water company has been established, and the decree is therefore, to that extent, erroneous.

It is immaterial whether the bill in case now numbered 79 is designated as an original or ancillary bill, the proceedings in said case 79 are for all practical intents and purposes ancillary to the proceedings in No. 41.

The bill of complaint in case 79, after setting forth the matters complained of, makes the following allegations:

"3d. Your orator would further show that under these ordinances it is impossible for your orator to do business, on account of the fact that in the event it sought to collect its lawful demands from the consumers of water it is liable to be imprisoned and its business wrecked, ruined and destroyed, and its power to carry on its business is being seriously impaired because its employees are restrained on account of the threat to deprive them of their liberty and publicly disgrace them.

"4th. Your orator would further show that its patrons are refusing to pay their water rents and only offering to pay at

the rates fixed under said ordinances passed by the defendant, and that your orator thereby has already been damaged in the sum of over twenty thousand dollars (and without relief bankruptcy of your orator is inevitable)".

The bill then prayed for general relief, and for decree "restraining defendants from enforcing said ordinances and annulling and holding them naught, and in requiring the city to perform their contract made in 1886, as aforesaid, in this respect, and from in any manner interfering with your orator's contract rights under said contract," etc.

The bill was sworn to. The bill also prayed that the defendant may be summoned at once to answer "according to the equity rule of this court."

The defendant answered under oath.

Some of the allegations of the answer are responsive to the averments of the bill and quite a number of them, we contend, are *not responsive* and present *affirmative* matter. This answer was filed about the 9th day of February, 1905. A general replication was filed July 3, 1905.

No attempt was made by the city to *prove by any witnesses* the allegations of its *answer*, and the court on the 3d day of January, 1906, rendered its final decree, reciting: "This cause coming on to be finally heard at this January term, 1906, of this court, upon the original bill of complaint, and the answer of defendant thereto, and all the exhibits which are made such, to said original bill of the complainant and said answer, and all the other pleas and proceedings in this case" (which, of course, includes the replication, etc.). Therefore it appears that the original bill, with all of its exhibits, which set forth in complete detail all prior evidence and proceedings, was in evidence before he court on the rendition of the final decree.

The appellant now says (Brief, page 44):

"Strange as it may seem, appellee, after filing a replication to such sworn answer, failed to take any testimony in order to overcome the sworn allegations of appellant's an-

swer as above set forth. The record contains no note of testimony."

And then again appellant says (Brief, page 45):

"It thus appears that after appellant had filed a sworn answer to the bill, which denied its entire equity by alleging * * * (3) 'that said rates were unreasonable and exorbitant, and that a court of equity should not aid the complainant in its efforts to exact and collect them,' appellee submitted its case for a final decree without taking any testimony whatever to overcome the responses of the sworn answer."

Again the appellant says (Brief, page 45):

"No possible comfort can be drawn from the testimony taken in the preceding case, numbered 41, as that testimony was closed before the ordinances of April 20 and May 20, 1904, were enacted. The result is that the uncontradicted responses of the sworn answer stand before the court as conclusive testimony which destroys the equity of a bill that should have been dismissed."

Some of these citations are italicized by the appellant.

When the appellant submitted to a hearing, *without taking any proof*, upon bill, exhibits, answer, and replication, then every allegation of the answer not directly responsive to the bill was unproved, and those allegations which were responsive were overthrown, we submit, by the proof introduced by appellee except the allegations relating to damages sustained, etc.

Mr. Foster in his work on Federal Practice, 2d edition, section 158, says:

"The complainant by filing a general replication admits the sufficiency as regards discovery, and as regards the form of pleading, but not the sufficiency as a defense, of the plea or answer to which it is filed, and denies every allegation in the plea or answer which is not directly responsive to the bill" (citing Humes *v.* Scruggs, 94 U. S., 22, and other cases).

We do not propose to extend this brief by analyzing the averments of the answer. It sufficiently appears, we submit, by a mere inspection thereof, that there are quite a number of averments which *are affirmative matter* and not directly responsive to the bill, and therefore *unproven.*

We are at loss to understand how appellant can so positively assume that appellee submits its case without taking any testimony to overcome the responses to the sworn answer, and practically in the same breath says "it can derive no possible comfort * * * from the testimony taken in the preceding case, No. 41, as that testimony was closed before the ordinance of May 20 and April 20 were enacted, as above stated."

That case was set out in the pleadings in its entirety, and was directly in evidence, both as an exhibit to the bill and by the fact that court considered it in rendering the final decree, and that case was the foundation upon which the bill in case 79 was based, which, we repeat, was for all practical purposes an ancillary bill.

The appellant is clearly in error when it states "that the testimony (in 41) was closed before the ordinances of April 20 and May 20, 1904, were enacted;" and this is shown *conclusively* by the record itself, which is, of course, unimpeachable evidence.

In the first place, there was no ordinance of May 20, 1904. *This is proven—*

1st. By the ordinances themselves, described in Appellants' Exhibit A to its answer (Record, p. 389).

2d. By reading the same ordinance, set out in full in the bill, which shows the word "May 20th" (Record, p 8) was a misprint, *April 20th being intended,* for it would be absurd for the mayor to approve an ordinance May 20th to take effect May 1st preceding.

3d. By the decree of February 24, 1905, restraining the enforcement of said *two* ordinances of April 20, 1904 (Record, p. 393).

4th. By the final decree of January 3, 1906, enjoining the enforcement of said two ordinances of April 20, 1904 (Record, p. 402).

The record also proves, as we have also shown in our "statement of the case," and now repeat, that the testimony in case No. 41 *was not closed before said ordinances were adopted.*

The depositions were taken on the following dates, as shown by the following pages of the record:

For Complainant.

M. O. Crumpler, sworn to February 29, 1904 (Record, pp. 269, 290, 304).

Dr. H. H. Haralson, sworn to February 23, 1904 (Record, p. 194).

Prof. A. L. Metz, M. D., sworn to January 8, 1904 (Record, p. 209).

Prof. R. W. Jones, M. D., sworn to January 7, 1904 (Record, p. 215).

H. J. Trowbridge, sworn to February 26, 1904 (Record, p. 233).

Jacob Voeinkle, sworn to February 12, 1904 (Record, p. 243).

J. M. A. Brennan, sworn to February 23, 1904 (Record, p. 245).

F. Streuby, sworn to February 17, 1904 (Record, p. 248).

E. S. Butts, sworn to February 19, 1904 (Record, p. 251).

J. B. Smith, sworn to February 19, 1904 (Record, p. 254).

Chas. Linstrom, sworn to February 25, 1904 (Record, p. 257).

David H. Herman, sworn to February 12, 1904 (Record, p. 260).

FOR DEFENDANT.

W. L. Trowbridge (mayor), sworn to April 5, 1904 (Record, p. 369).
Chester R. McFarland, sworn to March 11, 1904 (Record, p. 324).
J. J. Hayes (alderman), sworn to March 19, 1904 (Record, p. 334).
D. A. Campbell (alderman), sworn to May 4, 1904 (Record, p. 341).
C. Schuler (assistant fire chief), sworn to May 4, 1904 (Record, p. 347).
W. O. Smith (alderman), sworn to March 15, 1904 (Record, p. 353).
D. Montgomery (alderman), sworn to March 21, 1904 (Record, p. 358).
W. H. Bruser, sworn to March 10, 1904 (Record, p. 362).

All this testimony, therefore, was available, as well as said two ordinances of April 20, 1904, and said act of March 19, 1904, *before case No. 41* was heard, and it was the duty of said appellant to have asserted its right thereunder, if it had any, *before the final decree* was rendered; and, as we have already shown, the act of March 19, 1904, upon which and ordinances purport to have been based, was expressly relied on in this court on the second appeal.

The court below also had judicial knowledge of the act of March 19, 1904.

Furman *v.* Nichol, 8 Wall., 57.

The circuit court in case No. 41 had already conclusively declared and adjudicated, we submit, that the rates were reasonable, and that adjudication could not be attacked or overthrown by *one sworn answer*, nor by the oaths of five hundred witnesses; that adjudication stood for all time until reversed by this court.

Appellee, filed the former adjudication.
(rec. p. 5)
Appellant, admit the decree was rendered.
(rec. p. 378)

It is shown by the proceedings in case No. 41 that the city failed to point out any "inherent invalidity" in the contract, although required so to do by the decree of this court on the first appeal, and the record in case No. 41 necessarily embraced the decision of this court in 202 U. S., 454, wherein the attempt on the part of the city to prove as an "inherent invalidity" in the contract the right of the State of Mississippi to regulate the rates, and that the act of 1904 and the constitution of ~~1890~~ 1890 applied, were not held available, and the decree of the court below rendered on the 18th day of May, 1904, which we have hereinabove set out, and which prevented the defendant from interfering with or disturbing the contract or the rights, privileges or benefits of complainant thereunder, and from refusing to pay all moneys due and owing the Water Company thereunder, or from refusing to pay the contract price of water fixed by said contract, was affirmed in all respects except one by this court.

Therefore the complainant had before the court on the final hearing of case No. 79 not only *ample evidence*, but *conclusive evidence* of its rights, and the answer of the defendant was ineffectual, whether sworn to or not sworn to, whether supported by the testimony of one or one hundred witnesses, and did not defeat the right of complainant to relief. Even if this evidence had not been directly furnished, the court always has judicial knowledge of its own records.

"Courts will take judicial notice of their own records with reference to the prior proceedings in the case at bar."

American & English Ency. of Law (2d ed.), vol. 17, p. 925.

"An appellate court will take judicial knowledge of its own record on a former appeal."

Ibid. (note 3).

And this court has said:

"It may be said that the decree in the other suit was never pleaded, or proved, and no question of *res judicata* can be

considered against the earlier decision, as finally presented on the hearing of the latter case.

"This doubtless is technically true, but we take judicial knowledge of our own records, and if not *res judicata,* we may, on the principle of *stare decisis,* rightfully examine and consider the decision in the former case as affecting the consideration of this."

Bienville Water Supply Co. *v.* Mobile, 186 U. S., 212.

A minimum meter rate or charge is defined in Cox *v.* Abbeville Furniture Co., 54 S. E., p. 830, by the Supreme Court of South Carolina, August 9, 1906:

"The 'term minimum charge' as used in water-supply contracts, where the meter system obtains, usually signifies rate of compensation for expense and labor of being ready to supply water at will of consumer, though the supply be not used at all."

We therefore respectfully submit that if there is any fault in the failure to take proof, it rests again, as it did in the former proceedings, upon the city and not upon this company.

V.

Finally, we respectfully submit that this contract of thirty years' duration has already been shortened by over a score of years, and within a decade all of the Water Company's rights and privileges based upon this contract must cease and determine; and that necessarily, with the loss of the hydrant rentals and without contractual right to furnish the consumers in Vicksburg water at any price, the large sums of money it has expended in the operation and maintenance of its water-works system, and which, as we have shown, furnishes good and wholesome water, filtered by the voluntary establishment of a successful filtering plant—an obligation not imposed by any terms of the contract—the value of its property will be greatly depreciated. And hav-

ing also furnished the city and its inhabitants water sufficient in quantity and pressure, and with rates, both for hydrants and for private consumers, unchallenged by proof for years, and having had its rights repeatedly established in courts of competent jurisdiction, after years of unnecessary harassment by needless and expensive litigation, it ought now, in the declining years of its corporate existence, so far as the City of Vicksburg is concerned, be permitted to live in peace and comfort and without fear of continuous imprisonment and the confiscation of its property by repeated fines, and to charge the rates which it, without any necessity on its part, proved in a court of justice to be reasonable and just, for it has under its contract the power to make such rates and charges for the use of said water as it may determine, provided said rates or charges shall not exceed fifty cents for each thousand gallons, and therefore the water company has the right to make any rates—flat rates, round rates, square rates, meter rates—provided always it does not exceed fifty cents per thousand gallons.

It was incumbent upon the city, having made the charge, to show that the flat rate was more than fifty cents per thousand gallons. This was *affirmative* matter, we submit, and cannot be *sustained*, in the attitude this controversy has assumed, upon mere technicalities of pleading.

The bill in case No. 79 assailed and sought to annul the ordinances of April 18, 1904, which were manifestly based, as shown by the slightest inspection of their terms, upon rates much *less* than fifty cents for each thousand gallons. The two ordinances must be read together, and they show beyond controversy that the city wholly disregarded the contractual rate of fifty cents per thousand gallons, and would not permit a meter rate in excess of forty cents per thousand gallons, and all the so-called flat rates are necessarily based upon the assumption that no rate in excess of forty cents per thousand gallons, even if a meter rate, could be upheld.

The record shows that the city by its disposition of excremental matter has threatened the purity of the water supplied from the swift-flowing currents of the Mississippi, and thereby the maintenance of the filtering plant, though not imposed by the contract, with all its consequent expense is incumbent upon the water company.

The city has denied the validity of the hydrant rental; has sought in many ways to defeat the defendant's contractual rights, and it does now seem that justice and equity should restrain the city from any further interference with the defendant's property and contracts during the brief period that is still left of its official existence, so far as its relations with the city are concerned.

We therefore respectfully submit that the decree should be affirmed.

Respectfully submitted,

J. HIRSH,
MURRAY F. SMITH,
Solicitors for Appellee.